LEW KAH CHOO & ORS.

v.

INTER EQUIPOS NAVALES S.A.

COURT OF APPEAL, SINGAPORE
WEE CHONG JIN CJ
TS SINNATHURAY J
A WAHAB GHOWS J
[CIVIL APPEAL NO. 46 OF 1982]
31 JANUARY 1984

CONTRACT: *Claim for value of goods delivered - Account - Counter-claim and set-off - Breach of oral agreement.*

The appeal arose from a claim of the plaintiffs respondents for the sum of DM180,012 being the value of the stock of goods delivered on consignment to the defendants appellants ("the defendants") and for an account of what was due to the plaintiffs by way of stock in the defendants' possession and by way of the value of the plaintiffs' goods already sold by the defendants. The defendants claimed the right to set off the sum due to the plaintiffs against damages suffered by the defendants as a result of the plaintiffs' breach of an oral agreement under which the plaintiffs appointed the defendants their distributors and sole agents for their products marketed under the "Inter Equipos Navales" brand name. In addition, the defendants counterclaimed for the sum of S$1,120,000 being commission payable to them by the plaintiffs. The trial Judge gave judgment for the plaintiffs for the amount claimed less the sum already paid to their representative and allowed the defendants their counterclaim in respect of their commission arising from one of the contracts in the agreed sum of $38,541. The defendants appealed. The plaintiffs gave notice for variation of the judgment.

Held:

[1] The issue whether or not the plaintiffs were in breach of their oral agreement with the defendants, was the crux of the whole matter.

[2] The Judges' findings of fact that the defendants were in breach of their duty so as to justify the termination of the contract forthwith by the plaintiffs were however contradicted by documentary and other evidence. It was manifestly clear that the trial Judge had overlooked or failed to consider vital documentary evidence and the unchallenged testimony of independent witnesses, which contradicted his findings on issues of fact.

[Appeal allowed, judgment set aside, counter-claim allowed and the Registrar ordered to assess damages on counterclaim.]

JUDGMENT

Wee Chong Jin CJ, TS Sinnathuray J, A Wahab Ghows J:

The appeal arose from a claim by the respondents/plaintiffs (hereinafter called "the plaintiffs") for the sum of DM180,012 being the value of the stock of goods delivered on consignment to the appellants/defendants (hereinafter called "the defendants") and for an account of what was due to the plaintiffs from the defendants by way of stock in defendants' possession and by way of the value of the plaintiffs' goods already sold by the defendants plus interest thereon and costs. The defendants admitted receiving the stock of goods referred to in para. 4 of the statement of claim and stated that they received DM19,868.06 and S$4,695.55 for

some of plaintiffs' goods they had sold. They added that they had paid the said sum of S$4,695.55 to the plaintiffs' representative Karl-Friedrich Birger Merten, in Singapore on behalf of the plaintiffs and that as regards the sum of DM19,868.06 the defendants said they were entitled to set off the same against damages suffered by the defendants as a result of the plaintiffs' breach of the oral agreement made on 25 September 1977 under which the plaintiffs appointed the defendants as their distributors and sole agents for their products marketed under the "Inter Equipos Navales" brand name in the Far East and Asean regions for a period of two years from January 1978. In breach of the said agreement, the defendants alleged, the plaintiffs on or about 30 May 1978 incorporated a company in Singapore known as Inter Equipos (Far East) Pte. Ltd. to sell the plaintiffs' products in the Far East and Asean regions. Thereafter the defendants had been unable to sell the plaintiffs' products. The defendants then counterclaimed for the sum of S$1,120,000 being 8% commission on the estimated turnover for 2 years at $7,000,000 per year and 8% commission on the invoice price of the parts mentioned in the contract signed with Fukuoka Shipyard for the construction of two vessels belonging to Tanaka Sangyo, plus interest thereon and costs.

In their amended reply the plaintiffs averred that by the oral agreement made on or about 25 September 1977, the plaintiffs provisionally appointed the defendants to be their distributor in Singapore, Malaysia and Hongkong but denied that this appointment was for a period of two years or for any fixed period, that the distributorship extended to any part of the Far East or the Asean regions other than Singapore, Malaysia and Hongkong, that the defendants were appointed their sole agents or that there was any agreement for the payment of commission to the defendants as alleged in the defence and counterclaim. The plaintiffs' amended reply then set out the terms of the said oral agreement made on 25 September 1977, the terms of the agreement between the parties made in November 1977 and the terms of another oral agreement between the plaintiffs and the defendants made on or about 15 January 1978.

The plaintiffs admitted in their amended reply that they caused a company named Inter Equipos (Far East) Pte. Ltd. to be incorporated in Southeast Asia and the Far East but denied that this was in breach of their agreement with the defendants or that the defendants suffered any loss thereby. In any case, the plaintiffs averred, the said agreement was discharged, or alternatively, lawfully terminated by the plaintiffs at the end of May 1978 by reason of the defendants' fundamental breach of the said agreement in that they secretly and fraudulently and in breach of their fiduciary duty to the plaintiffs caused imitations of the plaintiffs' products to be made and offered for sale and sold in competition with plaintiffs' products and at lower prices and also by reason of the defendants constantly keeping relevant information secret from one Mr. Hernandez, the plaintiffs' delegate in Singapore, and ignoring his advice and directions and failing to refer to him the technical problems of customers of plaintiffs' products, whereby the reputation of the said products and the plaintiffs' goodwill suffered.

Kulasekaram J gave judgment for the plaintiffs against the defendants for the sum of DM.180,012 less the equivalent in Deutschemarks of the sum of S$4,695.55 but allowed the defendants their counterclaim in respect of their commission arising from the Fukuoka Contract in the agreed sum of $38,541.

The plaintiffs have also given notice asking for the aforesaid judgment to be varied by including interest on the sum of awarded to them at 8% p.a. from the 20 May 1978 until judgment.

At the conclusion of the hearing of the appeal we allowed the appeal with costs, set aside the aforesaid judgment, allowed the counterclaim and ordered the Registrar to assess the damages on the counterclaim. We now give our reasons.

It seemed to us that the issue whether or not the plaintiffs were in breach of their oral agreement with the defendants which was made on or about 25 September 1977 was the crux of the whole matter. Merten gave evidence to the effect that he suspected that the defendants had been fabricating his goods and had his suspicions confirmed on 19 May 1978 when he and Vincente Hernandez visited the defendants' factory at Jurong. So he terminated the plaintiffs' oral agreement with the defendants and incorporated the company called Inter Equipos Navales (Far East) Pte. Ltd. to look after his company's interests in Singapore. The learned trial Judge in his oral Judgment had this to say about Merten's evidence:-

> One issue I have to decide is whether Merten's evidence should be accepted and what value to attach to it. The difficulty is in his statement that he saw his lawyer only after discovery of these fabrications by the defendants. It is there that I have some doubts. Merten's evidence is weak on this one point, whether he saw his lawyer before or after his finding out of the breach by the defendants. My finding is that the main reason for Merten taking the action was because on that day when he went to Jurong he found that these articles were being fabricated there. Merten was justified in so acting when he went to the place and found that the defendants were fabricating his goods without his knowledge and had thereby breached their fiduciary duty to him. This fiduciary duty arose from their relationship that the defendants were the sole distributors in this part of the world of the plaintiffs' goods. .... And it is because of their breach of the fiduciary duty that Merten was justified in terminating the contract forthwith. I think in those circumstances it was not necessary for the plaintiffs to give any reasonable notice at all. The plaintiffs were entitled to terminate the contract forthwith. I accept Merten's evidence of what he saw that day. He was not quite accurate about what action was taken thereafter. He had suspected such activities for some time past; he had some information about it. Before coming to Singapore he had asked Hernandez to find out if this new company can be registered. He had that in the back of his mind as a possible course of conduct if his suspicions were confirmed. He would however not have taken any action but for the fact that when he visited the defendants' place at Jurong without prior notice to the defendants, he saw this fabrication taking place there. Once he saw it, that was it. I accept his evidence on that point. It was quite clear that the defendants were fabricating these goods without his knowledge. He was convinced that his earlier suspicions had been confirmed and that was the first time he knew about it for certain. He followed that up by letters and brought the matter to an end.

The Judge's findings of fact were however contradicted by the documentary and other unchallenged evidence adduced in this case. Mr. Tan Kay Bin, the plaintiffs' solicitor, said in evidence that on 16 March 1978 he was instructed by one James Khoo and Hernandez to find out if a company could be registered with the name Inter Equipos Navales (Far East) Pte. Ltd. That same day he wrote to the Registrar of Companies who replied on 3 April 1978 that the name proposed was available for registration. On 13 April 1978 he wrote to James Khoo informing him that the company documents were ready for signature and requesting him and Hernandez to call at his office to sign them. Towards May 1978 Tan Kay Bin was instructed that there would be three subscribers instead of two and that the third subscriber would be Merten. On 19 May 1978 in the afternoon, Merten, Hernandez and James Khoo attended at Tan Kay Bin's office and signed the company documents which were forwarded the following day to the Registrar of Companies. Tan Kay Bin's evidence was not challenged and is supported by certified copies of documents from the Registrar of Companies. The Judge's oral judgment made no reference to the documentary evidence or to Tan Kay Bin's evidence or to the defendants' suggestion that the plaintiffs had all along planned to set up

a local company without the defendants' participation and were falsely accusing the defendants of breach of fiduciary duty as an excuse for terminating the agreement between them. In our opinion, the Judge failed to assess Merten's evidence that he saw his lawyer only after discovery of these fabrications of the defendants against the background of the documentary evidence and the evidence of his lawyer.

The Judge's oral judgment also did not mention the fact that Merten had agreed to the manufacture in Singapore of certain types of equipment to meet urgent orders.

On 14 March 1978 the following telex was sent to Merten:-

RE: POSSIBLE MANUFACTURE OF SPREADERS IN S'PORE MR LIEW IS VERY INTERESTED IN THE MANUFACTURE OF SPREADERS IN SINGAPORE WITH INTER SPARE PARTS.
PLSE REPLY SOON.
V HERNANDEZ/J. KHOO
HCC

Merten replied as follows:

WE AGREE THE MANUFACTURING AT YR SIDE FOR THIS CASE OF LASHING BARS ST-5 ONLY.
REGARDS.
SD: MERTEN

RE: MANUFACTURING OF SPREADERS IN S'PORE
ATTN: MR HDEZ
IN GENERAL WE ARE WILLING TO AGREE PROVIDED AGREEMENT REGARDING JOINT VENTURE WILL BE REACHED.
REGARDS.
SD: MERTEN.

In this connection the following telexes sent by the plaintiffs to the defendants on 7 April 1978 and 13 April 1978 are also relevant:

THANKS FOR YR TX 7 April 1978.

1. FOR O/CALCULATIONS AND QUICK OFFERS, WE ESTIMATE THAT VOYAGES FROM SPAIN TO S'PORE TAKES 24/30 DAYS. BUT THIS SHOULD BE COUNTED FROM SCHEDULE SAILING DATES. EARLIEST SAILING FROM BARCELONA 1S 17.04.78 AND ARRIVAL IN S'PORE 10.05. IF THIS CAN'T BE ACCEPTED PLS MANUFACTURE YOURSELVES THE LASHING BARS AND SPLIT THE BENEFIT.
2. REGARDING THE SPREADER ALREADY SOLD IF NOTHING CAN BE DONE AS TO INTER'S BILLING, PLS ADVISE WHERE IS THE MONEY.
3. REGARDING O/LAST PARAGRAPH IN SPANISH LANGUAGE OF O/TX 1495, WE TRANSLATE IT.

   AS LONG AS THE NEW COMPANY ISN'T LEGALLY AND FORMALLY CONSTITUTED, MATERIAL IN STOCK IN S'PORE SHOULD BE BILLED BY INTER AS OWNER AND SELLER.

REGARDS.

INTER/AREAL.

YR TX 1046-3-7
OUR 8032-3-78

KINDLY CONFIRM WHETHER YOU PROCEEDED WITH MANUFACTURING ACCORDING TO OUR TX 1529 AND FOLLOW THEN WITH COPY OF INVOICE TO CLIENT, AS WELL AS INFORMING OF BENEFIT.

BEST REGARDS.

INTER/DE ANDRES.

On 14 April 1978 the defendants replied as follows:-

BT-2 MANUFACTURING IN PROGRESS.

APPROXIMATE COSTS IN SD60 EACH (FULL DETAILS WILL FOLLOW LATER WITH COPY OF INVOICE TO CLIENT).

REGARDS.

INTER/HERNANDEX.

The plaintiffs' delegate, Vincente Hernandez, arrived in Singapore in January 1978 and was working with and advising the defendants right up to the date Merten terminated the contract between the plaintiffs and the defendants. If there had been any unauthorised fabrication of plaintiffs' equipment in defendants' factory, he should have seen it. He was not called to give evidence and this the learned trial Judge apparently failed to consider.

The proposal for a joint venture was raised in February 1978. Several telexes were exchanged between the plaintiffs and the defendants and a final draft of the joint venture agreement to form a company to be called Inter Lashing Systems Pte. Ltd. was signed on 18 May 1978 by Merten on the plaintiffs' behalf and by a representative of the defendants. The draft joint venture agreement was amended on 19 May 1978 and Merten's signature appears on the amendments. However, that same afternoon Merten, Hernandez and James Khoo went to their solicitor's office and signed the documents to be forwarded to Registrar to incorporate their own company to be called Inter Equipos Navales (Far East) Pte. Ltd. Then on 20 May 1978 Merten sent the following letter to the defendants declining participation in the joint venture and in effect canceling the agreement of 25 September 1977:

Dear Sirs,

Re: Joint Venture

We have to confirm our today's meeting at the Singapore Hilton Hotel which took place in the presence of Mr. G.Q. Ong, Mr. Jimmy Lew, Mr. V. Hernandez and the under-signer. It was informed to Mr. G.Q. Ong and Mr. Jimmy Lew that Mr. Hernandez is declining to be shareholder and Managing Director in a joint-venture between Hock Cheong & Co. and Inter. The reason have been explained and will be confirmed by written letter by Mr. Hernandez himself.

Inter facing this new situation has been forced to decline participation in the joint-venture as to the conditions negotiated with you previously in the past days. We have therefore taken following decision:

1. Removing the consignment stock from your premises to a bonded warehouse.
2. Engaged Mr. Hernandez until further decision with the administration of this material.
3. Registering our name as private company in Singapore to provide legal backing of our interest.
4. Authorise Mr. Hernandez to keep contact with all customers on Inter's behalf to secure orders of pending projects.

5. Give guarantee to Hock Cheong & Co. for their commission on all projects pending until your no. 1068-5-78.

6. Provide the supply of possible orders to Hock Cheong & Co. if any order would be booked by them ex our bonded stock at same price as indicated in your price list for consignation stock, granting your full commission.

7. The board of shareholders of Inter Spain will be informed of the new situation and authorisation will be asked for to re-negotiate with Hock Cheong & Co. new conditions.

8. The undersigned suggest to meet Mr. Lew or Mr Choo in Madrid or London in Mid-June for new negotiations.

We trust that you will understand that without having a man of our confidence in a joint-venture where we are supposed to have 51 percent we cannot go on for the time being. Besides it is of essential condition to have a technical standard and service guaranteed to the client which requires an adequate trained man in our systems.

We regret the actual situation and sincerely hope that a solution will be found quickly to satisfy all parties.

We remain Dear Sirs,

Yours faithfully
INTER EQUIPOS NAVALES, SA
SD: B MERTEN.

Yet despite the reasons given by Merten in this letter to the contrary, the learned trial Judge found that Merten cancelled the agreement of 25 September 1978 because he had seen the fabricated equipment in the defendants' factory on the previous day. If it were true that Merten had seen the lashings and spreaders fabricated by the defendants without authority in the defendants' factory on 19 May 1978, he would have mentioned it in his letter as the reason for cancelling the agreement. He should have been angry at what he had seen and could not have forgotten it. He would not have been apologetic about terminating the said contract and would not have offered to re-negotiate a new agreement with the defendants. The trial judge plainly failed to apply his mind to these matters.

We were aware that normally an appellate Court would not interfere with a trial Judge's findings of fact as he had seen and heard the witnesses and would therefore be in a better position to assess their credibility. But in this case, it was manifestly clear that the learned trial Judge had overlooked or failed to consider vital documentary evidence and the unchallenged testimony of independent witnesses which contradicted his findings on issues of fact. After taking into consideration all the relevant evidence adduced in this case, we allowed the appeal.

Also found at [1984] 1 CLJ 329